

2/4/1/7/3

CONSTITUTIONAL ASSEMBLY

**THEME COMMITTEE 2
STRUCTURE OF GOVERNMENT**

THEME COMMITTEE MEETING

**3 April 1995
18h00 - 21h30**

M46

TRANSCRIPTION
(including minutes during power failure)
INHOUSE WORKSHOP
UNICAMERALISM/BICAMERALISM

THEME COMMITTEE 2

INHOUSE WORKSHOP ON UNI- OR BICAMERALISM

DATE : MONDAY, 06 MARCH 1995

VENUE : OLD ASSEMBLY CHAMBER

PROGRAMME

TIME	ITEM	PRESENTER
09H00 - 09H20	1. The Senate in South Africa - Past, Present and Future experiences and the Constitutional Principles	Prof. D. Davis
09H20 - 09H40	2. The Constitutional Principles and Bicameralism	Prof. V. Dlova
09H40 - 10H00	3. Continental Second Chambers	Prof. D. van Wyk
10H00 - 10H20	4. US Senate	Prof. N. Steytler
10H20 - 10H45	5. Possible roles for a Second Chamber	Prof. F. Haysom
10H45 - 11H00	Tea	
11H00 - 13H00	Discussion	

OPENING AND WELCOME

The Workshop was opened and chaired by Mr A.G. Ebrahim.

AMENDMENTS TO PROGRAMME

1. Prof. Davis to give input and then 20 - 30 minutes for questions.
Motivation: Prof. Davis requested to leave early.
2. After second input on Constitutional Principles and Bicameralism, questions to be posed.
3. Items 3;4 & 5 to be presented as a package and then discussion.

PRESENTATION 1

The Senate in South Africa- Past, Present and Future experiences and the Constitutional Principles - Prof. D. Davis

Prof. Davis referred to his brief and said that he will not deal with the Constitutional Principles as it will be dealt with later in the programme.

The Senate

Background to our Senate in 1910 and the Bicameral Structure of the old SA parliament with the House of Assembly and the Senate started off at the time of the 1909 convention. Of particular interest there was that all four provinces at the time e.g Cape; OFS; Transvaal and Natal all had Upper Houses for a variety of reasons. The point was that there was some discussion at the time of the Convention in 1909 as to why in fact an Upper House was required. The most important reasons that finally prevailed were :

- 1) There was a suggestion that the Upper House was a device for protecting the smaller colonies against the larger, at that time the Cape was by far the larger colony;
- 2) "Watching over the interests of the Coloured races" - the whole parliamentary structure was for whites only

What then happened was that those views prevailed and we got a Second House, the interesting aspect of the Second House was that it was supposed to be a House of Elders and there were a number of different qualifications which were laid down, viz.:

- 1) You had to be older than 30 ;
- 2) Property qualification i.e ownership of immovable property in the Union to the value of 500 pounds;
- 3) reflection of racist constitution (white South African)

The whole aspect about that constitutional arrangement was that the Senate was supposed to be free from the immediate influences of the electorate and that was why the suggestion was made that there should be an indirect means of electing senators and the suggestion was a two fold one. There were to be thirty two senators elected by the provinces, each province to get eight. The idea being that the smaller provinces had to be safeguarded at the expense of the larger. Eight senators elected plus an additional eight, nominated by the government, they were supposed to be "men prominent in the life of the nation who would otherwise be lost to politics". The suggestion was that they were supposed to be on a model of the House of Lords which of course specialises in ensuring that geriatrics can continue. However, in this case they were supposed to be men prominent in the life of the nation, but who would otherwise be lost to politics, that was the idea.

The other thirty two were to be elected for ten years, the importance of this was that the Senate was to last for longer than the Assembly, the members of which were elected for five years. The idea was therefore, that the whole body would continue for longer than one simple period of election. The way in which they were to be elected was an indirect election. Each province would have an electoral college consisting of members of the provincial council for that province and members of the Lower House for each province. The electoral college would then elect by way of proportionate representation (eight senators for the province). This therefore meant that minority parties would in fact get senators in proportion to their success at provincial council and national elections. The interesting thing about the senate was that the idea was that it was to be less powerful than the Assembly in that the whole idea was that money bills, financial legislation, taxation could only originate in the House of Assembly. The idea was too that the Senate could not amend these Bills, it could only approve or reject them. That particular process was then adopted and that was what was reflected at the time of Union. There were in fact a considerable amount of clashes in the early period of South Africa i.e the 1910s and 1920s particularly when the senate did not approve a series of Bills which had been passed through the Assembly. The Assembly became considerably concerned about the fact that there was this impasse in the whole range of matters. What in fact then happened was that a select committee was then set up in 1920 to relook at the whole Senate because of this problem and this committee then came up with a particular set of proposals namely,:

The number of senators should be increased so as to preserve the ratio of one Senator to three members of the Assembly;

The four nominated members should hold their seats for the same period as the elected Senators;

In addition to the eight directly elected Senators for each province, the balance be elected by all the members of the Senate and the Assembly together;

The Senators to hold their seats for seven years and not for ten and that the property qualification be discontinued.

There was a considerable discussion at the time as to whether the whole of the Senate should not be elected as it were by the population. The view was that the proposal that the Senate should be elected was rejected in 1909 and General Smuts decided that the proposals which were put forward to him would have made the Senate too strong a body and accordingly the old approach continued i.e the thirty two plus the eight. In many ways that was the way in which the Senate then continued right through until the 1950s. Then there was the so-called "coloured vote crisis case" and the national party decided that a little bit of political gerrymandering was in order at the time and the Senate was therefore changed.

The Senate was increased, it now composed of 80 nine members; 16 nominated vis a vis the government, and then different amounts for the provinces, 27 for the Transvaal, 22 for the Cape, 8 for Natal and 8 for the Free State and 4, two nominated and two elected for South West Africa as it then was called, and 4 members representing the black population. The critical change then was this, that no longer was

proportional representation adopted. That in effect what happened was that the senators were elected via an electoral college of provinces and the assembly, but the majority view prevailed, which meant that you didn't have the minority parties getting any senators. That of course changed, because once the separate Representation of Voters Act was adopted, the smaller senate then came back into operation. We had a senate in which then, the 89 was reduced once more, and what occurred was, that we had a senate composed as follows:

- 11 nominated senators, two from each province and South West Africa;
- and one appointed for the so-called coloured population;
- and then one senator for each ten members of the house of assembly and the provincial council in each province, again with the principle of proportional representation.

There had to be a minimum of eight senators, however, for each province.

The senate in its own way played quite an important role in a variety of ways in South Africa:

- One, because of the system of proportional representation;
- Two, because in the early days of South Africa you did get changes of government and because the senators lasted for ten years - it was possible, as occurred in the 1910's and 1920's, to have a senate where the majority of the senators were in fact not of the party which was governing in the house of assembly.

That was why you actually had those deadlocks. That was why the laws then changed in the 1920's to give the governor general, on the advice of the prime minister, the right to dissolve the senate in those cases which watered down its powers, and which is why the convention grew up that the senate did very little other than rubber-stamp the assembly.

Let me say one or two final things about this history. It is interesting to contrast this history with the history of Australia, because Australia was also a dominion, and that meant it was part of the great four, with Canada, India and ourselves and Australia. The Australians also went for a bicameral system. They also had a senate and an assembly. The difference between theirs and ours, was that in respect of theirs they did work by way of state, in other words the states of Australia elected the senators, by way of indirect election, and that continued right throughout. Given the character

of the federal structure of Australia it occurred at various times in Australian history that the senate was composed of a different set of people, parties as it were, to the assembly, or to the house of representatives (as the Australians called it). It was because of that reason in particular that the government of Gough Whitlam fell in 1975, and it's perhaps interesting just to refer to that for one half minute.

What occurred in that case, and it's the exact case study of what happens when you have a system of election for senators by way of allowing, as it were, the senators to be elected by provinces, federal structure, giving each province the same amount of senators, is that you could well have a situation whereby if you have your house of assembly done by a constituency system or by some form of proportional representation, but on a different system to the senate, what occurs then is that you get a different party controlling each house. That's what happened to Whitlam.

At the beginning of 1974 the Australian Labour Party, controlled by quite a good majority, the house of representatives, but because the term of the senate was different, and because they were elected by a different method, the liberal party controlled the senate.

What occurred in 1975 in Australia was simply this, that the Liberal Party knew it could win an election because the mood had changed against Whitlam even though he could have stayed in power till the end of 1976 till early 1977. What the Liberal Party wanted to do was to force an election, and the way they were able to do that, or tried to do that, was to block the budget in the senate. Now recall that even on the South African senate the possibility was open for the senate not to amend and not to initiate a budget, but they could refuse it. The convention of course which developed was that if you refused something on two occasions in the South African context, on the third one the assembly could pass it and take it straight to the governor general for approval.

That was not, however, what was argued in Australia. In Australia the argument was, that the senate could in fact, notwithstanding conventions, could in fact refuse a money bill, and it did. What occurred in the Australian context was that Whitlam ran out of money, or he was about to, and two weeks before they ran out of money the Governor General called him in and said, "Are you going to call an election?"

Whitlam said, "I am not going to call an election". He didn't want to, he was going to lose, and the result of which was, that the Governor General said fine, the fiscal bills will not be passed I am dismissing you, because it is in my power as the Governor General to dismiss you in order that some other government will then call an election to break the deadlock. Malcolm Fraser was then appointed as a caretaker Prime Minister, the bill had already gone through the house of representatives, it went then through the senate, a

new election was called and of course the Liberal Party won.

The point being made by this case study is, and it perhaps is relevant to our deliberations, is the question of:

- (1) what power you want to give to the senate, and
- (2) what kind of electoral composition the senate actually has.

Because clearly your difficulty here is, if you take the Australian example, is that you reach deadlock. And in this particular case, whereby if you have a direct form of representation on the house of representative level, you could well work out that another body, which was there for a longer term could well abort or subvert the wishes of the electorate as brought about.

That in a sense meant that the Australians had gone about the business in an entirely different way to the South Africans because for two reasons; one, because our senators were essentially elected by way of proportional representation. The majority party always had a huge majority in the senate. Once 1948 had come and gone the National Party were in power then right through, so you never had any change between the senate and the assembly; and secondly, because of the convention that had applied that with the fiscal bill, which was the most powerful power given to the senate, that is to refuse it, once the bills had been put twice, on the third occasion the assembly could simply pass it and the senate would be by-passed.

Now that very briefly, gives you some very potted history of what happened.

What is interesting, is that clearly:

- (1) the issue about the senate was whether it should be an elected body or a nominated body;
- (2) that although the idea was that the nominated members should be members who had some high but impartial political profile, that never occurred, it just never occurred.

That convention never, never ever held in South Africa. I might add it never held in Australia either, that's one of the things that I think one needs to learn from this history is that you either have an elected system if you want that, but don't rely on any form of nomination through a convention to believe that is going to happen.

Let me tell you what happened in Australia, since you think it's not only South Africa under the National Party where these conventions were overridden. The fact was that in Australia a custom had existed that if a senator died in mid-term, the state would elect to the senate a person from the same political party as the person who had died, and that was done through the premier. During the Whitlam crisis two senators did die; they were both Labour Party senators, and the Liberal Party states said to hell with this convention. In law we are entitled to elect whom we like and they

put two Liberal Party senators in, and there was nothing anybody could do about it. That was the law and that was the end of it, and that was absolutely crucial to the fall of Whitlam. The simple point is that when a crisis occurs don't rely on conventions, when political parties see the real possibility of gaining power. Maybe I am being terribly cynical and I am sure that you all are very different, but I am simply pointing out to you what the history was.

The other point that I do want to make is, I think it's an absolutely critical point, is the question of what powers are given to an upper house. Clearly the upper house, if it is given a form of election which can give it a different composition to the assembly, the issue that then arises is to what extent should it have powers to subvert the wish of the lower house which has been the one that has been elected by the electorate per se.

Now if I can just end by saying, you will in fact get discussions of Continental Chambers and the US Senate. Let me just make one point in relation thereto. The non-Commonwealth type senates of course have had very much more powerful roles, particularly the German senate which is a very powerful body, the Bundestag. Because there, in a sense, and I think we have borrowed from that in our own constitution, that is we have borrowed from it in the sense that, matters which pertain to the province per se cannot be passed through the lower house without approval from the upper house. In other words the upper house then becomes a safeguard of the federal structure of the German society. Recall we never had that in South African, so it never had that role, and therefore there was never anything defined quite as explicitly as that. In other words it's perfectly possible to specify what powers a senate should in fact have with regard to where it should or should not approve legislation. That's an important difference between our past and perhaps the Continental past.

Then of course the final point that I want to make is, that if you look at the nature of Federal structures, one of the major issues for the chambers which we started off with and then rejected, was the idea that there should be equal representation between the provinces. That smaller provinces should have as many senators as larger. Now that particular matter, to a large degree, was rejected in our history.

Perhaps let me just say this, I find it rather interesting that our present senate, in a sense, is very much a product of our past history, in the way it was shaped, in the way it was created, in the way in fact in which it was elected. If you followed my reasoning you will see that, to a large degree, we have really followed the precedence of the past, and perhaps we might want to rethink that too in relation to the way that works, and look at the senate afresh. Because clearly if one thing is of any implication it is this, that the senate in South Africa from the time it was elected really did very

little to safeguard "the interests of coloured people" and did very little to in fact safeguard the interests of the different character of the provinces, and I think that one has to look at that in trying to focus on your debates. I don't really think it is proper for me to say more than just tease out those implications for discussion. Thank you.

QUESTIONS AND DISCUSSION:

CHAIRPERSON: I would like to thank Professor Davis for his very important input. I am sure that many of you have very many questions that you would like to put to him.

MR C EGLIN: I was interested, first to comment on the Gough Whitlam in Australia one. While it's correct that the Upper House thwarted the will of the lower house, it actually reflected the wishes of the people, because when there was an election the Lower House was overturned in favour of the party supporting the Upper House. So while it was technically thwarting a Lower House which was properly elected, it had the effect of unlocking the will of the people while forcing a general election. It wasn't all that bad, especially as the Liberal Party came into power.

The point I want to make is this, you pointed out problems which may occur in a clash between the senate and the lower house, or the upper and the lower houses, and that it could be because of the composition or the period of office of the senate is different from the lower house, can you tell us, are there any countries in the world where the composition of the senate is not different from the composition of the lower house? In other words, it's always that, and I therefore would argue or put to you that if this is a problem, the solution must be found in the powers that you give to the senate in order to block or not block the lower house.

PROF DAVIS: Just in relation to the first point that you are making, perhaps it's because my party lost and yours won that I am upset about the Gough Whitlam thing, but to be perfectly frank about it I think the issue there is a profound one, it's not just a question of whether at that moment the electorate actually wanted the Liberal Party, it's the question that if a government is elected for a term of office, the real issue is, can you use the upper house, as it were to subvert that. In other words Whitlam would probably have said, I think and rightly so, rightly in terms of the argument, simply this that you know we had three years, that's what we were elected for, and if we had been

given our full chance we might well have been able to show the electorate our policies were the better, and that's I think what the argument was about there.

In relation to your question, is it a question of where in fact do they have the same composition, is that what you are asking?

MR.C. EGLIN :

The problem with the deadlock is a real one, you suggested it could be resolved either in the composition of the senate versus the lower house or in the powers that you give the senate. Now I just put it to you, as I understand it, the senates in other countries is always composed differently from the lower house, and therefore the solution doesn't lie in the composition of the senate as much as the in the powers that you give to the senate.

PROF DAVIS:

No I think that's correct. I mean the one example where of course the senate doesn't have really much different composition is in Canada, because there in fact, as I understand the senate, it's a nominate procedure by government for the various provinces. So in effect the senate really is a toothless institution there because to a large degree it reflects the composition of government of the day. I don't deny at all that the issue is, the issue is twofold, is do you see the senate in terms of having different, not only different powers but a different role. Now if it's role is different, I mean for example in the 1920's when for example there was deadlock in South Africa, interestingly enough about the Flag Act and the Mines and Works Act and quite a lot of important legislation; the opposition said, well the senate is a house of revision, it's there to reconsider and revise and therefore if we don't like it, chuck it back.

Now the question which I suppose arises is, a senate could do that in a vast variety of ways, but I would have thought that if the senate does have that kind of Canadian type composition then it's, you know, if for example it's always going to reflect the views of the majority party of the day then it's highly unlikely to play that role. On the other hand it might well be that you then have the situation where the structure might be relevant to this extent, if for example, as I understand the way we are supposed to work in South Africa at this present point, that if you change the powers of the provinces you have got to get a majority not just of the house, but of those senators representing the particular province in question. Then in a way, even though you have got a majority which will always be the majority, let's say you have got an ANC majority at the

moment, but if you want to change the powers of the Western Cape you had to get the National Party senators to agree, well then you have got in a sense a combination of both composition and powers which become relevant. So you can fiddle around with that menu. But at the end of the day, yes, there is no doubt that every senate that's been effective has a slightly different composition to that of the lower house and obviously specific powers, and I think the most effective would be is the German, which is the most powerful because there the various states are given representation, and secondly there are specific powers given to them and their most powerful powers relate to the powers of the states. There the Bundestag cannot do very much unless it's got the agreement of the Bundesrat and it has to play the very important role, but that's because of different composition and different powers

QUESTION :

Professor Davis can you divide power to some extent between three levels? You have the house, you have a senate and you have the provinces. Now you can have your senate as an extension of your house, where you can talk about cooperative type of parliament. Or you can have a senate that is elected separately, very independent and you have a kind of dualistic type of competitive type of system. Or you have the senate as an extension of your provinces. Now if you divide up in this way, then isn't it easier then to allocate powers, it depends what you are going to select, to decide on what powers are you going to give to the senate. I don't know, I tried to, can you see, because if you have a cooperative type of system and the senators are appointed you end up in you know what. If you have elected you have an American type of system and we tried, if I am right, nearer to the German system but also not correct because ...(indistinct) representing the provinces, and then I add in at this moment the powers allocated to the senate is really not enough to represent the provinces.

PROF DAVIS:

It's a very profound question that you are asking in this sense that it seems to me that there are two roles that you can ask a senate to play, and if you look at the effective senates, there are effectively two roles. The one is, as it were, a safeguard of provincial interests. At the end of the day, with all its other powers I suppose if you asked a German constitutional lawyer that's what they would say as being the most powerful aspect of the Bundesrat to keep this eternal federation as the German basic law defines.

By contrast the American senate is not so much a senate

which safeguards direct state interests. The argument there is that the states themselves must safeguard their interests, of course because as you know the residual powers are with the states. So the structure of the US constitution, at the end of the day, is where you find your safeguarding of your provinces and that the senate to a large degree, although representing each state equally, because they have each got two, so little states have the same as large ones, the fact of the matter is that to a large degree the senate is not a body which is geared as it were to safeguard provincial interests directly. It's there as it were as an autonomous part of Congress. The fact that it's character and composition is different might mean that it reflects different interests, but it's there as it were as a check on a majoritarian type system through the representatives even though that's not totally majoritarian, but that's what it's there for.

Now what I find, you know what I am saying is, you have really got two different models. Do you want a senate which brings a different focus of interests to bear on national legislation. I mean you could have variance of this, that's the one polarity. Or do you want a senate whose essential role is to safeguard the federal structure of the society by in fact refusing to allow provincial legislation through which might amend the province's powers. The truth is that both of those have been successful in their own way.

QUESTION :

(...not talking into microphone) to the house. The other one is kind of more independent type of set up, people select them, and that is merely a different kind of level of government if you take the concept of ...(indistinct). You always have ...(indistinct) to another. And a third one is coming in from the provinces, where you like the German, but okay they are not elected, but they give special attention to the interests of the province or the states, so there are therefore actually three types.

PROF DAVIS:

No I accept that, but I think at the end of the day what you, and all I am saying is, I take your point, I am saying what leads out of your point is in a way, there are the polarities and we can tailor what we want accordingly.

Can I just make one final point in relation to it. What is interesting about the American, particularly interesting, is the way that the American Supreme Court has used the senate to justify a federal override. What I mean by that is that the

senate, sorry the federal override, what I mean by that is that the federal government, the Congress can pass legislation for states and therefore override the powers of the states. Pass legislation which ultimately then holds for each of the states and the states can't then turn around and say hang on a moment that's our role, that's our job, you can't pass this.

What the American Supreme Court has said is, that by using the so-called Interstate Commerce Clause which overrides the powers of the state saying federal government can pass that legislation, they said well, if the states don't like it they are represented in the senate, and if the senate passes this legislation that simply gives power to the point that in fact the federal government is entitled to override the states, and strangely therefore, even though the senate wasn't composed to directly reflect state interests the fact is that it is being used by the American Supreme Court as a means to ensure increasingly larger powers for federal government at the expense of the states. Which itself is perhaps an interesting insight into the overall scheme of a federal structure.

CHAIRPERSON: Thank you very much. We only have about 10 more minutes and I think there are quite a few questions. If we could make the questions short and sharp. I think if you can make the answers even shorter then we will get through. Senator Groenewald I saw your hand up.

SEN. GROENEWALD: Thank you Mr Chairman. Professor Davis, I think in most democratic countries the lower house is very much the same, it's functions, it's composition and so on and so forth. I also personally feel that checks and balances should be built into your constitution in such a way that you don't really need a second house to look after the interests of the people as such. This is the house that is elected by the people, for the people. So the senate should in actual fact play a completely different role. Now my question to you is, that whereas the composition and the functions of the lower house is normally based on principles of democracy, the upper house should really reflect the country for which it is designed. It should be a house designed specifically for the country in which the upper house must function, do you agree with this principle? I think that is the basic question.

PROF DAVIS: Well could you give me an example of what you mean in direct terms when you say reflect the character...?

SEN

GROENEWALD:

Right, for example in the UK the democratic system evolved from a system where the country was governed by Lords and a completely different system, a monarchy, and with the structures of the monarchy, so the interests of the monarchy was protected to a great degree in the upper house. In South Africa we do not certainly have a homogenous society, we have very much a pluralistic society, and shouldn't this for example then be reflected in the senate as such?

PROF DAVIS:

Well I don't have any difficulty with that. What I am trying to tease out is what the functions then would be. Because recall your first point. Your first point is that the lower house, you are right, in all countries reflect the will of the people in an election. I mean the majority of the people will elect the majority party, and I suppose really what one has got to fiddle around with is, you know, to what extent the senate reflects what might be called, the fabric of societal institutions which in a sense should be put beyond the reach let's say of a transient majority in the lower house, on the one hand. Or do you give it powers which in a sense can subvert the will of the majority, and I would have thought that if that's the case then you are into a constitutional crisis. The one thing you can't do, I mean take the Whitlam situation, Colin Eglin is of course right, the matter was resolved by the fact that the Liberal Party won, but one wonders quite seriously what would have happened had the Labour Party actually won still with a Liberal Party majority in the Senate, still playing its nonsense. What would have happened eventually would have been that that whole constitution would have been rendered totally ... there comes a time when the majority are going to say we have won this election, and if you don't like it we will tear up the constitution, or change the house, you know, which in a sense means changing the structures. So you have really got to resolve what are the powers that you think are the ones which in a way by agreement, should be put beyond the reach of a simple majority. I suppose the Germans have said, for example, the powers of the provinces once we have agreed to them should be beyond the reach of the majority, because quite obviously if we are living in Bremen it's unfair for the rest of the country to turn around and tell Bremen what it wants to do, but that's by agreement. I am happy to debate that here, but it seems to me that that's really what you know, you people as the elected representatives are going to have to decide for us.

Yes I say for us, I am one of them.

QUESTION : What is the rationale for not allowing the senate to originate money bills? What is the historical reason for giving this limitation?

PROF DAVIS: I think it basically comes again from the British system, where your elected representatives were in the Commons and they were the government of the day, and it was thought that to a large degree, it was for the government who was elected to fashion the critical issue, no taxation without representation. Clearly you wanted the representatives to impose the taxation, and indeed that convention then followed through to most bicameral systems as a result. I mean, it does seem to me that it is right that if I am going to be taxed, I should be taxed by those people in fact who I have elected. That I think is the rationale.

FOLLOW UP: I would regard that as a somewhat unfair limitation, because all of the matters that are handled do have financial implications and it is important that the senate should have the ability to debate and also to originate some legislation relating to financing of the country and its activities.

PROF DAVIS: Of course it doesn't mean that an Upper house, can't deal with money bills. You know you might want, certain countries as I understand it, you can amend, you can change, but the actual initiation the idea has always been that the initiation should come through their duly elected representatives, but I mean that's the reason. You know if you have got a different view that's fine.

QUESTION: Professor never mentioned about native representatives who were there for the natives when we did the election. As a native I never elected them, how were they representing us in Parliament?

PROF DAVIS: Well I suppose, there were four members who were nominated, you are quite right, representing the black population, nominated through the Governor General. The short answer is of course once you have got that you know you are going to be represented badly. But there was a nominated procedure through the Governor General.

FOLLOW UP : Because there were eight nominated, men only, and you never mentioned about the representative from the Governor General.

PROF DAVIS: (revisits input paper), no what I said was that when it started

out, I mean it changed and what have you, but when it started out in 1910 there were 40 members, eight were appointed by the Governor General, four of whom, sorry, were appointed on the strength of "their knowledge of the needs and desires of 'the non white races'", and then the 32, so eight nominations, four for black South Africans, four I suppose for anyone else, the minority because we desperately needed more representatives, and 32 in the provinces. So you had four of the eight.

QUESTION : Thank you Mr Chairman. I am sorry I came late and I don't know whether Professor did touch on this thing but as I came in I heard him talk of, perhaps in passing, proportional representation, I don't know in what respect he used that concept, but I don't even know whether my question is going to be relevant here because when looking at the programme it does appear I may not have a chance of raising it ...(intervention)

CHAIRPERSON: Yes why don't you pose them and then we will decide whether it is.

QUESTION : My question is there are talks outside this house that proportional representation destroys the multi-party system, and if that is so to what extent does it destroy? I don't know whether it's relevant Mr Chairman. **CHAIRPERSON:** It is not relevant to this particular, maybe...

PROF DAVIS: All I wanted to say was, just to clarify, the system of proportional representation in the upper house, in the senate was simply on this basis, that each provincial council, let's say for the Cape and the lower house, let's assume that they had a 100 representatives of which 60 represented the National Party and 40 represented the United Party and there were 10 senators for the Cape, the National Party would have got six and the United Party would have got four. It was an indirect form of proportional representation. I have steered clear thank goodness, because you haven't asked me, to deal with the enormously complex issue as to how and whether we should have proportional representation for the lower house. That wasn't what I was asked to deal with. I have only been talking about it as an indirect system as I have given this example in the upper house.

CHAIRPERSON: Thank you very much Professor. I think on your behalf I would like to most sincerely thank Professor Davis for his very

important input. The first item was on the question of the Senate in South Africa. First I don't know whether we discussed whether we need it or we don't need it, but that was one of the issues. And the powers that we give to it, how it should be elected, whether it should be elected or nominated, and the question as to whether it should have equal representation or whether it should have proportional representation. These I think are important issues Professor for us in the theme committee to discuss. As you know this in-house workshop is not to decide but to collect as many views as possible so that we can pass it on to the Constitutional Assembly where the matter will be debated and decided. So once more we thank you very much. We know that you are a very busy man both during the day and at night, so we thank you very much. Can we then have Professor Dlova here so that we could start with the second, the constitutional principles and bicameralism.

PRESENTATION 2

The Constitutional Principles and Bicameralism - Professor V. Dlova

Thank you. Well as the topic says it's the constitutional principles and bicameralism. We will focus mainly on the second chamber because that is where the contention may be. I don't think anybody doubts that a lower house is indispensable to democracy.

Now before we attend to the more substantive aspects of this presentation a short background note on the key phrases may be necessary here. Now what do we mean by constitutional principles? Here reference is being made to the solemn act or declaration which is contained in schedule four of our interim constitution, which qualifies or restricts the mandate of the Constitutional Assembly in dealing or in deciding on the content as well as the form of our constitution. As is well known the product of this constitution making has to be vetted by the Constitutional Court against such principles before they may certify that the new constitution is in accordance with the constitutional principles. It is important therefore, that we familiarise ourselves with the stipulations of the constitutional principles, whenever evaluating the efficacy or otherwise of any constitutional option that we may wish to exercise.

Now we come to what we understand by a second chamber. A second chamber here means a chamber of parliament which is additional to the one that is largely elected on the majority rule or popular mandate principle, that is on the basis other or additional to the numbers game. A chamber of

parliament premised on another principle than popular mandate, or a chamber of parliament that considers as central other additional factors to its composition than the will of the majority simply stated.

Now what are the conceptual underpinnings of a second chamber, what is the philosophy behind it? A second chamber if not cosmetic must in its very nature mark a conscious deviation from the basic democratic model that the majority must invariably and at all times, rule. It is a form of institutional checks to majority rule at the legislative or law-making level. It draws into the legislative process for one reason or the other elements that ordinarily could have been excluded if the basic democratic model would have been strictly adhered to. Such elements may constitute vestiges of powerful forces of yesterday who would be sidelined by an unadulterated principle of majority rule.

In the British model such elements include the leaders of the Anglican Church, hereditary successors of the landed nobility, captains of sport, industry, professions, arts, prominent yesterday politicians etc, who may at the discretion of the Prime Minister in consultation with the leaders of opposition parties get life recognition in the House of Lords, known as life peerages.

In most federal formations including the United States, such protected interests relate to disproportionate or ...(indistinct) representation of sub national units, which is embodied in the principle of equal representation of states, regions, provinces in the second chamber, irrespective of population or territorial size of the state in question. It is a principle that is currently followed in our interim constitution also.

Of course the second chamber is but one of possible institutional checks of majority rule principles at the legislative level. There are many others. Few however, can contradict that it is by far the most conspicuous within the legislative process.

Now we come to the composition of the second chamber. A second chamber may be elected or non elected. That is it may be a direct ...(indistinct) restricted popular mandate, or no popular mandate at all.

An example of a non-elective second chamber is perhaps the hereditary qualification to second chamber status which is embodied in the British model. Executive or lower house nominate second chambers have some indirect or popular basis, but often vulnerable to manipulation by majority party interests as was demonstrated in our coloured franchise exclusion saga in the 1950's.

It is also possible as is done in our interim constitution to allow parties

represented in the lower house to nominate upper house deputies in accordance with a constitutionally prescribed formula. That must reflect the relative strengths of the different parties in the various regional assemblies. This may provide an effective check to turn the second chamber into a pliable extension of the majority party acting through its in-built majority in the executive or the lower house.

Now we come to the issue of competence or power of the second chamber. Except in a limited category of matters fundamental in, for example, the act of association as a state or the survival of the democratic model in the perception of the founding fathers, the competence of the second chamber is largely that of an institutional check or junior partner, rather than an equal partner with the house of representatives.

This junior partnership may be reflected in numbers of the second chamber vis a vis the first chamber, and the powers that may be assigned to it. In the British model for example, money bills, that is bills relating to collection of revenue, expenditure or raising of loans may be passed without the cooperation of the Lords. This is important within that system since the upper house potentially can muster more than double the numbers in the House of Commons. However, when it comes to extension of the life of parliament beyond the maximum five years, the British system demands the cooperation of the upper house.

In federal formations the cooperation of the legislature, or the legislators that embody regional interests, is usually required when issues of internal boundaries or powers of the constitutionally recognised sub-units are at issue. Except for the extreme examples given above, the power of veto of the second chamber will usually be suspensive, that is allowing for more time for issues to be aired and canvassed under the glare of the public. That is a role of scrutiny and revision, rather than that of partnership or incompetence and status with the lower chamber. Deadlock breaking mechanisms may include joint sittings or enhance majorities in the lower house to override a second chamber veto.

Now we come to the Constitutional Principles themselves. A second chamber does not form part of the essentials to our constitution that are embodied in the peace treaty or solemn pact known as the constitutional principles. Reference is made to a second chamber of course in schedule four, principle XV111 subsection 4 dealing with amendments to the constitution that alter the powers, boundaries, functions or institutions of provinces. Such amendments require two thirds majority of a chamber of parliament composed of provincial representatives.

A crucial addition, however, to this provision is that if there is such a chamber. Furthermore, this requirement is made as an alternative to

approval by a special majority of the legislatures of the provinces. It should be noted, however, that a central theme in the negotiation process especially on the part of those classes and elements that stood to lose in an unadulterated numbers game, was the need to marshal a formidable array of institutions that would keep the majority in check by a powerful or substantial minorities, be they corporate or territorially based.

The question that will have to be answered in due course is whether the key parties and interest groups will consider whether the formal and distinct voice that loads the dice to some degree in favour of a non-majority interest is dispensable or not at this stage. The question may assume more significance if the idea of constitutionally prescribed coalition at executive level is not extended beyond April 1999. If we do opt for a second chamber then a right balance between the two houses will need to be struck especially on issues of composition, competence or power. The experience of the interim constitution will need to be carefully evaluated in this context.

If we dispose with the second chamber then we may have to find a formula outside the legislative process or within the lower house, that will retain the hope and faith of substantial minorities in the constitutional process. This must be done without over-exposing our Constitutional Court or casting it into a fire brigade function. Thank you.,

QUESTIONS AND DISCUSSION

MR C EGLIN: Chairperson may I ask the Professor, he alluded to the British upper House of Lords which was really a relic of hereditary people representing either the monarchy or the nobility as part of the structure. Has he got any experience in Africa, is there any evidence in Africa that there is either an upper house or whether hereditary people, whether they be traditional leaders or others have a role in the legislative function either in an upper or a lower house when they are not popularly elected? In other words, I understand the British one, I am not au fait with the African one, but are there any instances of upper houses or even lower houses where non-elected people in the form of hereditary leaders play a role in terms of the functioning of that house.

PROF DLOVA: In the lower house?

MR. EGLIN : No, well in the upper house if there is an upper house.

PROF DHLOVO: Yes. Well the African systems were based on the Westminster model most of them, and actually what happened was that in

most of these they substituted chiefs or traditional leaders for their hereditary principle of the British system, and they substituted appointed upper house members for the life peerages which are at the discretion of the British prime minister as it were. So that was mainly the case, for example in Lesotho, that was the situation.

QUESTION :

Professor you are obviously of the point of view that in terms of the current constitution the existence of an upper chamber or a second chamber is not a necessity, now you seem to be saying that there is an alternative, there can be a provincial veto as it is, would that be a correct assumption by me that ...(indistinct) that in terms of this constitution it would be possible to do away with the second house but to substitute a provincial veto ?

PROF DLOVA:

Well what I was referring to was principle XV111, subsection 4 which says that when it comes to boundaries of the provinces, when it comes to institutions of the provinces and when it comes to the power of provinces you need a two thirds majority of the upper house and that principle goes on to say that if there is such a house which it leaves open, the issue of the other house, but it goes on to say alternatively if there is no such other house, then the special majority of provincial legislators would have to be carried along in any decision that impinges on these areas of provincial competence.

Now I would say if you wanted me to comment on that, that it is an elaborate process. The provincial legislature process is an elaborate process. The other problem that you may find there is that you may have either to create a forum for those provincial legislators or you may dispense of course with the forum for those provincial legislators, but you wouldn't have a central voice of provincial situation within the framework of the legislative process. So it would come more as a veto after everything has been done within the house as it were, or within parliament.

QUESTION:

There is in effect a state veto in the United States constitution where the states may in fact veto an amendment of the constitution if 75% of them do so. I was thinking on those lines in regard to our position as it stands now.

PROF DLOVA:

Except that in America that veto is an addition to the senate, in other words it is a fine comb for those things that the senate, for perhaps political expediency, have decided to overlook and the provinces still feel strongly about. So it is an

additional tier of provincial protection rather than a substitute. But what I am just saying is that here our constitution makes that a possibility.

CHAIRPERSON: Thank you Professor Dlova. It seems that there are no other questions on this particular issue, so can we then move over to the next set of presentations. Thank Professor Dlova for his input, and we can say to him that the points he has raised have been noted and I think it appears that everyone is satisfied with the position that he has put forward. Can we now move to the other three. We have about 40 minutes and I think if we can have an input by Professor Van Wyk for the next 20 minutes, then follow with the others and then have discussions after the tea break.

PRESENTATION 3

Continental Second Chambers - Professor D. van Wyk

Thank you Chairperson. Ladies and gentlemen, just to show you that we haven't conspired beforehand, that's your so-called experts, to give you a certain kind of picture, I think what I have to present may contradict some of the things that Professor Dlova has just told you.

The theme on the programme is a bit ambitious. To give you here, in 20 minutes a review of all the Continental systems or even most of them, is simply impossible. So what I have done was to take six countries, and I have cheated a little because one of them is not Continental. Three of these countries are, in essence, so-called unitary states, the other three are federations. The unitary states I propose to say something about briefly are the United Kingdom, if that's part of the Continent of course, Spain and Belgium. The United Kingdom I don't have to say too much about it, you have heard about it and I think many of us know about the system in Britain.

The Spanish and Belgium systems are maybe a bit naughty here, because although they are not formal federations, they are on their way towards some kind of federal arrangement, and especially maybe in view of the debate in South Africa whether our current constitution for instance, is federal or not federal, Spain and Belgium may be good examples.

The federal systems I would like to present briefly are Australia, that's the non Continental one. One could have looked at Canada as well, but by all accounts the Canadian system of a second chamber is a very weak one because there the senators are appointed by the government and they have few powers. So Australia, Switzerland and Germany, unfortunately I didn't

have access, at fairly short notice, to the new Eastern European constitutions. It might just be worthwhile for this committee at some stage to have a look at that as well, and I also wanted to say that maybe we should have had something on Africa on the programme as well. To Mr Eglin, Botswana for instance also has a house of chiefs as a second chamber.

Now to start off briefly with the United Kingdom. Of course you know that is the House of Lords, the second chamber. Professor Dlova has told you about its composition. It's a weak second chamber, it mostly has delaying powers and not very effective delaying powers, but I think the important thing to note here is that it does represent a class and certain interests, but I think in sum one can say that the British House of Lords is more an institution than an effective organ of government. That's not a judgement, it's just a kind of evaluation.

Spain has a senate, called a senate, and here creeps in an interesting phenomenon. The Spanish senate consists of 300 members, so it's not as, I think Professor Dlova has suggested, invariably a small body, 300 members, 200 of whom are elected by the Spanish provinces which are smaller units than the so-called autonomous communities and the autonomous communities elect the other 100. They are directly elected by the population and each voter has a choice of three, each voter can vote for three persons, in other words on a first past the post basis. But interesting, despite its size, the Spanish senate essentially has only delaying powers. In other words it is the representative chamber, the lower house or the first chamber, that has the final say.

In Belgium again, the senate is fairly large, between 180 and 190 members. But in the Belgium instance an interesting mode of composition. A 106 Belgian senators are directly elected in exactly the same way as their national assembly, 106 of them. 52 of them, that's according to a formula, it can change, but at the moment, according to the census of 1991, 52 members of the Belgium senate are so-called provincial senators, in other words come from the Belgian provinces and the number of senators from each province depends on the population of the province.

There is a third way of becoming a Belgian senator and that is by cooption as the Belgians call it, it's actually a form of indirect election. The directly elected senators, the 106 of them and the provincial senators sit together and they elect a further 26, half of the number of the provincial senators, or if the number of provincial senators is uneven, one more than half of the provincial senators are indirectly elected by the other senators. Interesting enough one commentator says that this was intended to bring in expertise, that's also a notion in South African politics, people from outside parliament, the non-politicians, those who don't want to get involved in the dust, or the

cut and thrust of ordinary politics, bring them in as indirectly elected senators. What happened in practice though was that it became almost a kind of catch all area for politicians who didn't make it in either the national assembly or as directly or indirectly elected senators. In other words it became a political thing and not a technocratic or something else.

Fourthly, there are a small number of senators who can claim to sit in the senate by virtue of their relationship with the King or the Queen of Belgium. I think at the moment there is only one of them.

The powers of the Belgium senate despite its size are equal with that of the House of Representatives on a strict basis, in other words everything that the first chamber passes, must be passed in exactly the same way, in the same wording by the senate as well and unless that's happened the bill cannot be signed by the King. Interesting, commentators say that this phenomenon of passing the bill from one house to the other, which is called by the nice French name of Navette doesn't occur frequently in Belgium, probably as a result of very sound solid prior consultation between committees and individuals in the two chambers, and they solve conflicts or difficulties about bills, I get the impression, more in the passages and in committees than formally across the floor of houses.

To turn quickly to federal constitutions I will start with Australia, small senate, 76 members, 12 provinces, six members from every province. They are directly elected, interesting, directly elected on a proportional representation basis which you all know by now. They are selected for six years. Half of the seats become vacant after three years, so every three years there is a senate election.

Australian Senate, has equal powers to the Australian House of Assembly. In the event of conflicts, again another interesting procedure. First, messages are sent between the two houses. If they don't work, a joint conference is organised between the two houses, but not the whole houses but seven or eight representatives from each house. Whatever comes out of that goes back to the houses and up to two times a bill can be rejected by the senate or by the assembly and if that happens there is a so-called double dissolution, in other words both houses are dissolved and everybody has to stand for election again. Even then if the deadlock continues, only then, a joint sitting of the two houses takes place and the bill is passed by ordinary majority which means because the senate is smaller and the assembly larger, normally the first chamber or the representative one gets his way.

Now in Switzerland the senate is called the Council of States, directly elected by the population on a majority basis. The interesting feature here is the cantons, ...(indistinct) the provinces if you like, themselves decide

upon this procedure. In other words it's for the canton to decide how I am going to send my representative to the Council of States. Elected for a period of four years, only two per canton. I am not quite sure how many cantons there are, but there can't be too many, so that means that the Swiss Council of States is a small body, two members per canton, half a canton gets one member.

An interesting feature also of the Swiss model is that a member of the Council of States may at the same time be a member of a canton legislature, translated into South African terms, a member of the provincial legislature may also be a member of the senate, but the so-called free mandate applies. In other words the senate, or the member of the Council of States may not vote on the instructions of the persons from the province.

That small senate or Council of States in Switzerland has the same powers as the first chamber, in other words must approve both - the laws must be passed by both of them. But once again history plays a role because the commentators all tell us that the history of consensus in Switzerland, the collegial nature of its executive, the fact that members of the executive come from more the right of parties and of course the phenomenon of the referendum in Switzerland, ensures smooth operation between and relationships between the first chamber and the second chamber. So no provision in the constitution for conflicts, but conflicts are more-or-less avoided as a result of historical factors.

Germany, the last one I would like to present shortly is an interesting one, and I think few people actually know how undemocratic the German second chamber is. First of all it consists of approximately 50 members. Depending on the size of every province, or region or land as it's called in Germany, it gets three, four or five members. These members of the Bundesrat as it's called or the senate if you like, are nominated by the governments of the provinces. In other words the equivalent of the premier and the political of course would sit down and decide who was going to the senate. The normal thing that the premiers, the minister presidents if you like, sit in the German senate. Now there because they represented, they are representing the länder with a very strong emphasis on that, the German senate has no legislative term in other words it goes on for ever and ever, as long as the constitution lasts and is not dissolved because it represents the länder and their interests.

Another interesting feature about the German one is that the representatives from a specific land or province must vote as a block, they don't vote as individuals. They vote, unlike in the case of Switzerland where they also may hold double positions as it were, in Germany the members of the senate vote on the instruction of the provinces where they come from or the länder where they come from. Predictably the German senate has an effective veto

on anything that passes through that parliament which affects the interest of the länder, and then I think they also have a veto on the amendment of the constitution. But apart from that they can be effectively overruled on all the other matters which do not affect the interests of the provinces, but as a result of interpretation the commentators tell us that in 50% of the cases the agreement of the senate is required and in the other 50% of the cases it's not required, and ultimately of course the Constitutional Court, the federal Constitutional Court decides on what are matters affecting the interests of the länder and what are not matters affecting the interests of the länder.

The German senate does other interesting things like nominating or appointing half the members of the Constitutional Court and the other half of the members are appointed by the first chamber.

Procedure for conflict resolution, a mediation committee of 11 members from each house sits together and in the event of a conflict work out a compromise which goes back to the houses and they keep on doing this until they have an agreement.

That's just a brief overview Chairperson, from which I think one can make a few deductions. The first one is that the historical background to the development of a second chamber is important in a specific or in a given situation. The second conclusion one can draw is that second chambers are popular. One finds them all over the world, one finds them in so-called unitary systems; one finds them especially in federal systems and even those with very little power somehow seem to remain which leads one to the next conclusion that there is no right or wrong reason for having a senate. In other words one can't really say that unless the conditions are so and so and so, you cannot have it all if the conditions are so and so, so you must have it. There is no such rule.

Next conclusion which is more on the statistical side is that the size of senates differ, the powers of senates differ, the way in which they are elected differ, which leads me to the final conclusion that on a comparative basis it would seem to suggest that one can tailor a senate or a second chamber to suit your own peculiar needs. Thank you.

CHAIRPERSON: I thank Professor van Wyk for his input.

PRESENTATION 3

United States Senate - Professor N. Steytler

**Embargoed until 18h00
Monday 3 April 1995**

TC2 : Inhouse Workshop Report - Uni-Bicameralism 6 March 1995

I would just like to start off or take on where Professor van Wyk left off, he said you can tailor a senate to your own likes, and I would like to disagree on that in terms of the experience of the US senate.

Now it's often been said that there is association between federalism and bicameralism and so I am picking up from what Professor Dennis Davis said this morning, that is to say that if you have a federation there must be a second chamber to protect the provincial interests or the state interest against the central government. Now this is not necessarily so, but the majority of federations do have a second chamber, and the question is whether it's inevitable and secondly whether the second chamber serves a useful federal function, that is to say protecting the provincial interests. He I would just like to discuss the US senate as an example. Other senates should also be discussed in this context, particularly the Australian one because it was particularly modelled on the US senate.

Now the first link between federalism and the bicameralism is that the second house is often the consequence of political negotiations which establishes the federation. The aim here is to give small states or provinces representation at the centre.

In the US an upper house, the senate embodying the principle of equal representation for all states, was the principle which the larger states had to swallow in order to get a federation in the US.

When the constitution was drafted in 1787 the fierce struggle for power centred on the representation in the legislature. The small states wanted all the states to have equal representation. The more populous states wanted representation based on population size. So the great compromise broke the deadlock. Small states received equal representation in the senate, two each, but the house of representatives, there it would be popular. The number of each state's representation would depend on the number of people living in that state.

Secondly, the house of representatives retained the sole power to originate money bills and the same argument that Dennis put forward is why in the representative only vest the right to originate money bills. So the result is that every state has two senators and that the senate is skewed in favour of smaller and rural states. 100 senators, two from each of the 50 states, while there are 435 congressman, representatives, distributed proportionately throughout the various states.

In the north western states the number of senators equal or sometimes even surpass the number of representatives. For example in the state of Idaho there are two senators and also two congressman, while there were six

states which only one representative each in the house of representatives and two senators, for example Wyoming and Montana.

Now the same principle of equality of the states happened in Australia, the less populous regions feared that their interests would be swamped in the legislature composed by popularly elected lower house. Again equality of the states principle prevailed and Australia as you have heard, there are 10 senators for each state, Tasmania with 282,000 voters elect the same number of senators as New South Wales with 3 million voters. That applied to the original six states.

Now in view of the reason for the creation of the second chamber the method of appointment has been very important, and the aim has always been to secure the protection of state or provincial interests. So for the first 100 years in the US, senators were elected by the state legislators. It's only as recent as 1913 that the election of senators was done directly. So in Australia, and they copied the US model in 1901, they followed that it was the state legislators that appointed the senators. It was only in 1949 with the increase in the house of representatives that the Australians start using proportional representation by a single transferable vote for the selection of senators.

Now although the aim of the second chamber has always been the protection of provincial interest or state interests, there was also a secondary principle as well, that it was to be a limiting or a house of review of the more populist first house, and this was particularly so where the senate received a direct mandate from the population.

Now in the founding of the US constitution it has been argued that some of the founding fathers said that the function of the senate should also be seen as that of a house of review. So the original intent was that each piece of legislation should pass first by the people in the house of representatives and then also by the states.

But, as we shall see, soon the - because of this duality in function, it very often becomes the case that the senate no longer pursues the interest of the provinces, but are more interested in the national issue. So it can be said now of the US senate that it can be maintained quite separate from its original commitment to provincial matters.

So with this duality in functions, provincial interests, national interests or this reviewing function, very often there has been taken place a shift from the provincial interest to the national, and that very often, contrary to the express interest and express intent of the founding fathers and mothers.

So in most second chambers, there are very strong powers to nationalise the

activities of the senate. To minimise the interest of the provinces. And this is the result of a combination, both from the method of election, also the structures of the senate, for example it's powers, and thirdly also the political context in which it operates. If you look at the US one can see how this operates.

In the US the method of election of the house of representatives is that congressmen are elected for two year terms, very short two year period, while senators on the other hand are elected for a period of six years.

Now a congressman must thus fight every two years for re-election and the domestic issues in his or her electoral districts dominate their activities. They have a smaller constituency and the constituency can obviously demand greater accountability. In contrast, the senators have three times the amount of time to devote to other matters, particularly national matters and they are not so closely linked to local constituency politics. Moreover, their constituencies in the states are much larger and therefore are not so much bound on the small day to day issues that an elective member or a congressman would have.

So the method of appointment and the length of appointment plays or has an important influence to bear on the type of activities that the senate will engage in.

The second important factor influencing the activities of the senate are their powers, and in the US the powers of the senate is decidedly focused on national issues. Together with the House of Representatives it must pass all legislation. The only limitation is money bills may be introduced in the House of Representatives, but it's of practical little consequence because all bills, including the money bills, must be passed by both the house and the senate.

Secondly, the house or the senate has the power to impeach the president. The house of Representatives has only got the power to initiate, to start the impeachment process, the senate has the power to act as court and to convict the president.

The third important power of the senate is that it must ratify all international treaties by two third votes, so one can see the powers that are given here to the senate tend to focus the senate's activities on international matters, not the local state matters which was the original intent.

Further and finally, the senate plays an important role in terms of approval of federal appointments, so again the intention is on federal issues, the appointment of ambassadors, cabinet ministers, federal judges. So the activities, the powers of the senate clearly indicates what type of activities

they will be engaged in and there has been a clear shift from looking after state interests to looking after international interests.

A third important factor determining the type of activities and the interest protected by a second chamber is the political context in which it takes place and here the role of mass parties, political parties, are critical because if the political party has a strong discipline then it doesn't really matter whether a person comes from a province or not, it is loyalty to the party that often comes first.

So the result is now that, particularly in the US, the US senate is imminently a national institution dealing with national issues for a national audience. Some go as far to state that regional representation in the regional base or the state base of senate is only important as far as election, and it's then said that the US senate is a national institution first and a federal one at a very poor second. Now it is argued that the same has happened in Australia.

Now from this very brief comparative perspective it appears it is often difficult to force a second chamber to perform a particular function that is to protect the state interests, the states from where they come, those interests. As one commentator said, constitutional engineering is an imprecise science. Designing an institution is not only likely to be bedeviled by major differences over the goals and direction of change but it is subject also to the uncertainty of trying to guess the political context or range of contexts under which such an institution must operate.

Well, second chambers has often been designed to protect regional interests. This has been countered by the influence of nationalising pressures coming from mass parties and the existence of this very national institution where the national debates take place. However if federalism is often seen as an aspect of constitutionalism which stresses the dispersal of power and the limitation of government, then bicameralism is a natural ally of federalism.

So the argument is, if federalism is concerned solely with protecting provincial interests, then second chambers usually do not perform that function very well. If however, the second chamber is seen as an aspect of federalism, and federalism here is seen as limiting power, dispersing power in a number of institutions, then it is a natural ally to federalism but this presupposes the existence of a powerful and also autonomous upper house such as the United States Senate. Thank you Mr Chairman.

CHAIRPERSON: I thank Professor Steytler for his important input.

PRESENTATION 4

Possible Roles for a Second Chamber - Professor F. Haysom

Thank you Mr Chairman. Two preliminary comments.

First of all I must say I speak in my personal capacity and of course, don't represent the President's office where I am based. Secondly, I am not going to traverse all the possible utilities to which a senate can be put, I am really here because of a view which I have been developing amongst inter alia members who are here and outside and in academic forums and which I was asked to present to you.

I hope at least, possibly to raise what I believe are kinds of questions which should be raised in trying to devise or answer the question as to how the senate should be structured and what role it should play, if indeed it should play any role at all and I think we come to the debate with the capacity to devise a structure which best suits certain purposes. We don't carry at least into the debate on the senate some of the historical baggage which other countries had to bring in, such as Australia and the United States in conceptualising a role.

My own exploration of this issue really comes from a re-visitation of our federal structure and looking at the existing function role and composition of the senate, and I think at least some questions can be asked as to whether it performs its function. If we assume that its function is largely to represent, as in other regional federal systems, some set of regional interests, then we should ask whether it has the powers to effectively perform that role and I would argue that some of its powers would question or undermine its capacity to play an effective forum for provinces. Its composition is one, certainly I would suggest, which in practice, leads it to be viewed as a mirror-image of the National Assembly, representing more or less the same parties in the same proportion re-looking at the same questions.

So in upshot, it has neither the distinctiveness, which I think would lend itself to a very specific and targeted function to which we could ask the question and answer it: does the senate perform a function which this constitution gives it?

I think the first questions we would want to ask in regard to the senate is basically, how is it composed, what does it do, and the important question which links those two is, why does it do it? I think if we can't come up with a clear answer then there must be serious questions as to whether, within a cost benefit assessment of the need for a second chamber, such a second chamber is needed at all. I think broadly the line of argument that I am going

to be developing arises from the question, the three options which basically confront, I believe, the Constitutional Assembly.

Do we dispense with the Senate because its role is weak and relatively unclear or do we tinker with it so as to fashion it into something more appropriate along the lines of what it does, or do we re-conceptualise its role within government as a whole?

I don't think the question of the senate should be dealt with as a truncated question, something separate from an overall perspective of government and all its organs and instruments.

My own thinking was prompted by a debate recently by a Harvard law professor who argued that there were two distinct kinds of federalism or regionalism which manifests itself in constitutions. The one is to adopt the spacial legal separation of powers, very much based on a regional distinction division of powers as between provinces, that is amongst themselves, and between themselves and the centre. And the second one which gives the regions, as regions, greater power and influence at the centre.

The second we might call, a kind of cooperative federalism and the first a more competitive federalism. Very briefly, the Canadian model would represent something along the lines of a competitive federalism and I believe the German model would represent something of a model of cooperative federalism.

If we look at our existing system, it seems to me that there are some immediate issues which arise. The first is the degree to which important questions of governance are determined by the courts on an analysis of a relatively complex legal provision which attempts to divide powers and it seemed to me that in trying to look at a new model we might want to question whether the courts should be determining which powers should be allocated by the centre and which powers should be allocated by the regions or between the regions.

Secondly, we needed to find a mechanism which would refocus our questions around good governance, cost effective governance, accountability in governance, and not the questions which are set out and our existing Section 126. We need to approach the whole question of institutions of government which didn't simply layer instruments of federalism or regional interest as we have done with regional lists, the senate and regional legislatures without clearly defining or analysing the structure, and the reasons why we would want some or other regional influence, and I think that it's in answering those questions for me that the senate came to represent a potential mechanism to answer those questions.

In short what I would say in the model I have tried to develop in answering those important questions, what function, how is the senate composed, whether we need a senate? The senate suggests itself as an institution which can play a much larger role in determining which functions are exercised in the regions and at the centre, and it can do so as in the German model by endorsing national legislation, and in doing so, it largely sets the terms. It ascribes the powers to the province or to the centre.

Secondly, it does so by building in a regional model in which the regions collaborate in national legislation affecting the provinces, rather than separating the regions to deliberate on possibly even national questions within a regional context.

So what are the implications for such a model? What are the implications for such an institution in conceptualising its structure?

Well I think in the first instance, if we are going to retain a senate, it should have more concrete powers. Unless it has powers, the sense that provinces have of their ability to influence national legislation will largely reside in their regional legislators and not in any participation in national legislation. So the senate offers the possibility of bringing regions together at the senate to have a more deliberate and extensive influence over national legislation which affects the provinces. The question as to whether they should also have influence over national questions in the proper meaning of the word, defence, justice and so on, is a question I leave open and there are arguments which would say the provinces should also have some lesser power, some perhaps delaying influence over some of those issues. But the primary focus, I wouldn't want to as it were, develop the same ambiguities in the conception of a senate, it should be primarily the place in which provinces come together to co-manage the country together with the National Assembly in regard to provincial affairs.

It allows us, I think, to shift the model we have developed of regionalism, away from competing regional legislators, competition over executive powers, competition over who exercises powers and shift it, quite frankly, back to national parliament in which the senate plays this decisive role and the provinces then, perhaps in accordance also with the German model whose role is perhaps more properly identified as one of carrying out and executing national legislation.

The implications for the senate, apart from the kinds of powers that they would have, there are implications for the way we structure and compose the senate. If it's going to play this role, I believe its got to have a more on-going relationship to the provinces than the current senate has. I think there can be an accusation, or certainly it has been raised, that provinces don't regard the senate as the place where they really exercise any effective

power. The senators themselves are appointed for five year periods don't have an on-going relationship with their provinces, and it might be that one wants to think of a way of comprising the senate, instead of direct elections, but have representatives come directly from the regional legislators in an ongoing way subject to mandates and re-callability. In that way it cannot be said by the provinces or the provinces cannot feel in any way distant from that process. So there is an actual presence.

One of the implications of this is that it changes the notion of the way in which the senate works. In that way senate comes to be a place where even regional experts, people involved in the administration and the executive in the provinces, would possibly come to the senate wherever the senate will be and form joint committees with the national assembly determining questions of national education and on the specialist areas which require some determined impact by the experts of the executives of the place where services are actually delivered to play a part in determining patterns and programmes and legislation dealing with a service delivery on a national scale.

Just simply I perhaps need to finally remark that I think that the two are linked, I've given you a conception of a senate which is more expanded in certain respects but it goes together with a new model of regionalism in which, as it were, there is a shift of authority in law-making towards the centre because of the role of the senate, and at the same time a shift in execution and administration to the provinces. This is undoubtedly a different conception of federalism to the one envisaged in the constitutional principles which seems to more or less assume that we will in the new constitution merely replicate with some tinkering, the existing framework we have developed. In my view the critical constitutional principles, I am not going to refer to them now, are the ones which say the provinces shall not have any inferior powers in the new constitution, is accommodated in this model because one's giving them substantially more significant influence in devising national legislation at the expense of the powers to enact provincial legislation.

I might just say that I think it's a model which probably doesn't offer existing institutions a hell of a lot but I think for those who bear the responsibility of devising an effective set of institutions of governments, it provides a more harmonised system.

I give you those thoughts because I think the question needs to go back to the beginning. The question needs to be raised, what function will the senate play? If it does not have a distinct form of representation, does it justify itself? If it doesn't provide a distinct constituency some level of influence and a reason for that influence, then I think the future existence of a senate has to be raised. Thank you.

CHAIRPERSON: Well I thank Professor Haysom for his input, I think it is a very important one. We have had three very important inputs by Professor van Wyk, Professor Steytler and Professor Hayson. I am sure that they will be here immediately after tea and we then come back at twenty five past eleven to start the next session when we will discuss these three papers that have been given, the three inputs and may I take this opportunity of thanking you, and when we come back I will hand over to Mr Mahlangu to chair the meeting. Thank you very much.

TEA BREAK

CHAIRPERSON:- Mr. E.G. Ebrahim

I think we should resume, I have been asked to continue. I hope you have no serious objections. Before I call for questions or contributions, I just want to make two short announcements. There is a register that is being circulated. Members of the theme committee's names appear on that register. Please sign that register but those who are not members of Theme Committee Two and who are present here, please enter your names on a space provided on that sheet so that we could also keep a record of that.

The other question is that when you ask questions, because the whole discussion is being recorded and will be transcribed, I will be grateful if you could identify yourselves so that when the transcribing takes place they are able to select who said what. I will be grateful for that as well.

Now as you know that we have Professor van Wyk, Professor Steytler and Professor Hayson with us here, who made the three important inputs. I was trying to find out how we could structure this discussion so that we can have a most fruitful outcome from it, but I thought what we would do now is to allow you to ask questions to the three persons who made the necessary inputs and then after that we can try and structure it on the question of to see because what we are talking about mainly is, do we need a second chamber? If we need a second chamber, what would be its specific task? How should it be elected? Should it be nominated, and what should be the form of representation in it? Should it be equal? These are issues which can be discussed along those lines.

QUESTION : Thank you Mr Chairman, I would like to ask a question of Professor Steytler. I wonder whether you could say something about the relationship between the US Senate and the Executive. We often hear or read in the newspapers that the Senate has vetoed the decisions of the president. What is the position actually? And to perhaps Professor Hayson, I would

like him to give us the difference between federalism and confederation. People often talk about the two and I don't know whether they are the same or not the same. If they are not the same, is there a senate also in the case of a confederation? Thank you.

PROF. STEYTLER: Just in terms of the relationship between a senate and the executive. The powers of the senate is limited to, in terms of executive actions, particularly in the appointment of senior officers in the executive like cabinet in the so-called senate approval of judges, of cabinet, of ambassadors. So in that sense they don't make the appointment but they can be a blocking device and in a number of occasions they have in fact been blocks, I think the last one was Judge Bork for the supreme court which couldn't pass senate.

With treaties the same thing, ratification so it is a blocking mechanism as opposed to for specific provisions like the ratification of treaties. The other more important controlling factor of the senate is that a legislative initiative coming from the president can effectively be blocked by the senate and a difficulty which President Clinton has at the moment is that both houses of congress, in fact, are controlled by the Republican party. And for example his health legislation which he can initiate in either house simply will not go through in a form that he would like it; it would have to be something which the majority parties, the Republican party in both houses would agree to. So the great block at the moment is that he must cooperate with Newt Denridge??? to get through most of his important legislative or his campaign promises. So that is, I think, the greatest block on and a controlling device which the senate has on the executive.

MR HENDRICKS: To Professor van Wyk...

CHAIRPERSON: Oh sorry, there was a second question about the question of confederation and federation.

PROF HAYSON: I think we have tried in our debates to avoid the actual labels because the labels tend to fix an attribute and then the debate is then concerned to squeeze a system of government into the label. But by and large there are two poles, the one being unitary and in the most unitary system rather like the old Roman emperor, the governor, there is no independent government out in the provinces, there is simply the governor and he does what Rome tells him. There is no independent

executive. On the other extreme that would be the ultimate unitary state.

On the other extreme is your confederation, which is almost separate countries who come together, stay as separate countries with autonomy to make laws but agree amongst themselves that some or other central institution will represent them either as far as foreign affairs or defence, but only to the extent that they continue to allow it and in general in a confederation in the most extreme model, any province or any state can opt out at its own instance without any hold by the rest of the states to compel it to belong.

Somewhere in the middle is the vast range of permutations, and the issue is further muddled by the fact that real politics can actually make a unitary state extremely federal in character and in operation. In another country with a federal constitution one would find an extraordinary unitary system of government. For example it is said that Australia has very unitary system with formally a very federal constitution and there would be a number of questions which constitutional scientists would direct at any system. Is there an independent legislature? Does it make its own laws? What is the extent and powers of its own executive? Can it make its own decision as to whether will it be a part or not part of the institution? So I think confederation is the ultimate form as it were of federalism, and unitary is the other end of the extreme.

CHAIRPERSON: Yes Mr Hendricks.

MR HENDRICKS: Thank you Mr Chairperson, to Professor van Wyk. You mentioned some figures there for the various senates, in particular Spain having 300 senators. What is the relationship between that number and the number in the lower house? How many members are there in the lower house and then for the other countries you mentioned also?

PROF VAN WYK: Chairperson, unfortunately as regards Spain I'm caught out. I can't give a precise figure, it won't be more than 400. In Germany there are, I think at the moment 520. As a general rule, I think one can say that depending on the population of the country, the first chambers vary between about 250 and in exceptional cases, I think the British House of Commons is one of the largest with approximately 600, I think 635 or something like that. So any second chamber consisting of more than 120 members in relation to the first chamber is already a very large

one.

[**** Due to power failure tape fades and cuts out]

MR PAHAD: The speaker noted that the workshop was supposed to cover unicameralism/bicameralism, whereas the presentations had assumed that there would be a second house. He further noted that it may have been helpful to look at the situation in New Zealand and Finland where there were unicameral systems.

He noted that there should be checks and balances on the legislature but information is required about the central legislature, and not only the executive. He noted that if devolving of some kind of power to provinces is considered, then possibly the electoral system can be so organised that there are smaller constituencies. In the final analysis he noted that the TC has to answer these questions in satisfaction before looking at the necessity of a second chamber.

MR HAYSOM: The speaker noted that the real debate is whether there is a role and function for the second chamber. The chambers have different mandates and answer to different constituencies. It is difficult to see how the unicameral parliament can rearrange itself to deal with checks and balances. He also noted the important role of the electoral system, as well as how political parties are organised, their federal structures, and how it answers to different parties. Such parties may push provincial interests further in order to survive. It is difficult to predict or control. In the example of the unicameral system, the house may comprise representatives from particular provinces, and in this way one is really creating Senate by another name.

QUESTION: Are not the following issues which come up constantly: internal economic models, i.e. interstate commerce, bills passed which cost states, fiscal relations, and the financial and fiscal commission?

MR HAYSOM: The harmonisation of fiscal and other relations.

QUESTION: Should not the Financial and Fiscal Commission be much closer integrated into the political system?

In Botswana it was necessary for the government to create a

house of chiefs. Here, the role of chiefs greatly divide the country into traditionalists and modernists. Accommodation should be created somewhere, possibly by enlarging Senate (rather than another structure); but some people had mentioned a House of Chiefs. Therefore the problem is one of conceptualising the accommodation of traditional structures.

MR HAYSOM:

We have to look for roles where the public can hold them accountable. My model does not preclude putting other interests in. Similarly to Metropolitan Councils, labour and business also feel they need representation. Therefore the question is should they also include appointed but important sectoral interests.

Having decided that Senate plays role A, then youth, gender wants representation. As regards traditional leaders, their role should be tailored. Then it is possible that Senate should not play a certain role.

PROF STEYTLER:

A comment on experiences elsewhere in Africa:

Zambia: a report during the movement to multi-party democracy was under discussion, in respect of which a second chamber was proposed, but a weak body, without direct elections. Uganda: a second chamber was rejected, mainly on the ground of costs involved. The idea to base traditional leaders in a strong second chamber was mooted, but the democratic movement was not in favour of that idea.

QUESTION:

How does the model operate in the USA?

MR HAYSOM:

The Senate is used to avoid relegating important issues of governance to the courts. For example, questions arising from section 126 of our interim constitution, such as whether it is desirable to exercise power alone - when a dispute arises, is the court to decide? On the US model, in respect of the question of governance, the Senate therefore forms part of the checks and balances.

PROF DU TOIT:

One cannot talk about the Senate without taking into account what happened historically, in view of the provincial system, in a unitary parliament. A question is put to Prof Van Wyk, concerning his understanding of veto powers.

MR EGLIN:

A question that is posed is whether it is possible to find a reviewing or moderating role of Senate. But this is difficult to look at until there is a philosophical understanding of what is

required, and the relationship between the centre and the regions.

PROF VAN WYK: Two things now affect my thinking: Firstly, the duty of the provincial government to go the way of regionalisation.

[**** Power reinstated, transcription continues]

PROF VAN WYK: The other one of course, are the constitutional principles in terms of which provinces are almost guaranteed an existence in the future constitution. I think Mr Eglin is correct that details one can not perhaps work out at this stage, but it may not be unfair to assume that in terms of the existing constitution and the constitutional principles, there will have to some kind of link, connection between what we can call regions or provinces at the moment and the national government and I think that's where in my own thinking the run of the senate in the national government also comes in. I happen to agree on many scores with what Professor Haysom has put forward here this morning.

CHAIRPERSON: Professor Haysom, might you have something you want to add?

PROF HAYSOM: No just simply to agree with what Mr Eglin has said. In fact I think that youv'e got to start off with what you want, how you want government to run. What is the principle in my view as I have indicated, the idea of a more cooperative relationship between province was a guiding light or a beacon behind which then to say the senate could play a role. If at the end of the day you don't come up with a role of the senate, I don't think we should create a senate to copy other people or because it seems a good idea.

QUESTION: What are the functions of the house of the chief's in Botswana compared to the house of the chiefs that is going to be formed in South Africa which will advise the President once a year? Whereas these people are the owners of this country and they met us only once a year. I want to know their functions.

PROF DLOVA : Mr Chairman I just wanted to comment. I don't think I'll answer that question except to say that the purpose of workshops is that we try to focus on a certain aspect. Some of these issues like the electoral system, the traditional chiefs and what have

you, have got their own sections within our programme. I'm not saying that we should not refer to them but I think that we should, in future, look more closely on the issue of preparing for seminars. I think the core committee, the secretariat, the technical committee, should meet so that some of the questions are discussed before hand as to what do we want. For example the question that was asked by Mr Pahad is a very real one. Our whole seminar today was on bicameralism and not on unicameral or bicameralism and if we had sat down and planned, we were phoned last week and told that we don't think it will be necessary for you to come and so on and later we were sent programmes etc. as to how we should come and present some papers and so on and we end up with a situation, I am not saying that we have not done very productive work, we have done very productive work, but the most important thing is for us to meet beforehand, discuss exactly what we want to elicit to come out of the work shop and so I should think that that is one thing that I should want to mention Mr Chairperson.

QUESTION:

I think this is an in-house workshop and the question asked by Chief Ligege. I want to throw it back to him so that we can have maximum utility of this workshop. What I would like to know from Mr and I pick it up he is unhappy to let the house of traditional chiefs should advise the President once a year, maybe it will be more helpful if we can take it a step further, and he suggests what he thinks the role should be and then those issues will be canvassed.

CHAIRPERSON:

Would you like to follow that up Chief?

CHIEF LIGEGE:

Yes Mr Chairman. In the traditional role we have got also three tiers of government and also in the government of South Africa, is the same. So the traditional leaders must not be bound to advise the President once a year. They must be also in the tier government also from down all the steps because what is being debated in the parliament is affecting the subject of the traditional leaders. I'll stop there.

CHAIRPERSON:

Let me just say this there that our discussion today has been clearly stated is on the issue of uni- or bicameralism and I think we are going to have a specific discussion and a block as far as the traditional chiefs and the traditional authorities are concerned. I think it will be best brought in there. If, however, it affects the question in the unicameral or bicameral system where they fit in, then of course it's quite relevant, this is what

I was hoping would come out in this discussion here as to if there is a place within that structure that it will come out. But I do not know if we should, may I ask inKosi Holomisa there for his input on this question so that we can find some solution to it?

MR HOLOMISA: I don't know whether I'll find a solution but it is a question of concern that I want to express. That each time we have to deal with certain of the themes that we are dealing with, when it comes to the question of traditional leaders, it is always shunted aside, it is always said that no, no, no, there is a special structure that has been set aside to deal with this issue. That we are going to deal with it later and yet it is clear in many senses like in this question of unicameralism or bicameralism, that the question of traditional leaders should be as germane is proper that it be discussed here because if bicameralism does not only have to do with what happens in the United States of America or in Europe, it is part of the constitutional structures in Africa as well, and if we are going to be talking then about bicameralism let us not forget about the situation that is closer to home here in South Africa. So I don't believe that really it is a matter that is not quite relevant to the issue that we are discussing.

So I think in future, when we have to conduct workshops of this nature, people given the task of looking into particular issues, they must not try to avoid the question of traditional leadership, because avoid it we may do but in the end we will have to deal with it head on and the sooner we tackle it, the better, Mr Chairman.

CHAIRPERSON: I thank you. I don't think there is any attempt on the part of any one of us to avoid discussing this issue. We are just trying to structure it in such a way that we could have a meaningful discussion on it.

MR PAHAD: Mr Chairman, it must be said here because it's not a fair comment. As part of the core group that was responsible for this. There is a special section dealing with traditional leaders. There was a meeting this morning of overlapping theme committees to deal with this issue and so the question of the type of representation should come in. People have a right to sit here and say they think traditional leaders should be part of a second chamber, traditional leaders should be part of a first chamber; labour business, that's not a problem, but it wasn't the intention of this in-house workshop to go into those kinds

of details.

I wanted to make that point Chairperson but I want to say something about this conceptualisation of unicameral or bicameral because I agree to some extent only with Mr Eglin. But sometimes it raises the question of whether it is the chicken or the egg that comes first because in a sense it is difficult to visualise the structure of government without visualising certain other elements that go into it, so it becomes very difficult then to say where should we start and where should we end.

It seems to me what should be the guiding principle and the guiding principle must be the process of democratising this country. This must be our guiding principle and we have to be guided from where we have come as South Africans, never mind what happened in Botswana or what happened in the United States or Germany. They are important but fundamentally important is our own history, from where we have come and secondly, where we want to go to. And I think that's very important and therefore in that sense, if a bicameral legislative system is going to make a greater contribution towards the process of democratisation, and towards a process of taking governments closer to the people then I think that is what should guide us in terms of whether or not we have this. We can then come to the details about how the structures could be formed.

The second general point I wanted to make is in looking at it we start with the assumption that there should be a second chamber, call it what you want, then it seems to me it is necessary to discuss the relationship between those who are going to be directly elected, whether it is constituency based or proportional based, whatever it is, who are then elected on a basis by people, and they are elected through their political parties but at least with a notion that these people are supposed to go to some institution to defend some kind of national interests including part local and provincial interests.

What then becomes a relationship between those who are directly elected and if you have a second chamber of people who are indirectly or maybe not even elected at all? Because this is an important form of relationship that seems to me what we need to discuss. We are not taking positions here, we are throwing ideas here. We need to discuss in terms of a process of democratisation. This relationship that must then exist

between those who are directly elected and those who may be possibly indirectly elected, if we take Professor Haysom's point of view, then they would be elected anyway. Because if they are coming from provincial legislatures, they would be elected to provincial legislatures, they are not indirectly elected in that sense, they are directly elected. But if you are going to have indirectly elected people, as you have in some other situations, then it does raise a question for me, how can an indirectly elected person actually exercise as much power as a person that is directly elected by the constituents in terms of a process of democratising this country.

CHAIRPERSON: Will any of the panellists take up that issue or is that a comment?

QUESTION : Mr Chairman to Professor Steytler. He mentioned something very interesting. Your senate, when they are elected, and they moved away from provincial or state interests onto the national level. Isn't this promoting democracy because your voter now has a choice to vote for one party for a house and for another party when it comes to the senate, and you create a more competitive situation and then actually that is what is happening in ...(indistinct) sometimes in America?

This is the one question, the second one, coming back to my first question, with the Garcia court case, the Supreme Court. The Supreme Court, or the federal, throughout in regard to the inter state ...(indistinct), throughout the province, the states said no, you don't have protection under the constitution, I throw it back now to congress to decide, but now the problem is there is nobody specific to look after the states in a congress. Isn't that again, there is a weakness in the system, there is a gap in the American Federal System?

CHAIRPERSON: The question is posed to Professor Steytler.

PROF STEYTLER: It is an interesting question and it ties up with what Mr Pahad said, about if your system is to be democratic and then define what is democratic and the one element that had come through in our constitutional principles is proportional representation that there be linkages between the people who are in a particular chamber, and who are elected ... (indistinct) which now brings us to the question of the disproportionality that you often find in second chambers, because it is equal representation of states very often and therefore each state can get ten seats or whatever number which are disproportional

very often to the people in their constituencies, because now you want to compare states as opposed to people, and will have to grapple with that issue. If you are serious about proportional representation and that notion of democracy, then it's going to affect the level or the method by which you are going to appoint persons. So you can't just simply set and say well each province will have X numbers of seats because then you can get the dominance or not the over-representation of a number of people.

In terms of a competitive position between the senate and the second chamber and the lower one, clearly in the US you have what some people even call the undemocratic senate because it is skewed in favour of certain states. You can have a competition between the two and very often it could be personalities. At the moment there is a very clear lining up of political forces and the political parties are the dominant feature as opposed to the personalities in the senate.

But clearly unless there is a different way in which you elect your senate, and a different constituency, you very often, because of the position of mass political parties, you are going to have alignment. Unless there are different tenure periods for which they sit or their representation is different by example having not proportional representation there - then you won't have that competition. So that competition that you are referring to is a product of method of appointment, duration of appointment, and which then brings us back is that this difference in appointment, is it compatible with the fundamental or the constitutional principles we talked about proportional representation as a guiding principle as one that was underlying our institutions. So that for a comment.

QUESTION:

I would just like to know that if an accord is reached that there should in actual fact be a second chamber, a senate. Has the panel any specific views on what size this chamber should be, given the fact that presently many people feel that the 490 member parliament that we have in the country is much too large and also that in the other house there is already a senate, those people elected on the regional lists. So in actual fact we have two senates, one inside in the one house and one outside, and we were given sizes of senates, but not in relation to the other houses that existed in the other countries. Are there in other countries, or are there any other countries where the senate is in actual fact larger than the lower house?

PROF HAYSON: It obviously depends on why you are setting up your senate. There could be an argument that you need more people if there's direct elections because there's a closer relationship between a person and the number of people he represents.

The proposal I made basically says people come to represent their provinces, they are on a terminable mandate, they just basically are messengers from the provinces, they can change. In that system it really does not make any difference whether you have three or thirty representatives, and under that system I would suggest somewhere around about five per province, you would structure your size to fit your purpose. The problem with many of these debates is people just start off with a figure; ten sounds good, twenty, thirty, if you ask people why ten and not twelve or eight or six, people very often are unable to fix an answer. With the national assembly there is at least a clear motivation that on the one hand you have got cost and on the other hand you have got quality of representation. In the senate very often that argument doesn't apply to the same extent and the senate can be reduced in size, in my view, quite considerably.

CHAIRPERSON: Professor van Wyk?

PROF VAN WYK: Mr Chairman an interesting observation was made that there is a perception that at the moment in the national assembly there is already a senate because some people were elected on a regional list. I think a clear distinction should be drawn, in a kind of debate like this, between where representatives come from, whether it's in a national assembly or in a senate and what they are in terms of the constitution supposed to do. They can come from a region without really promoting the interests of that region as they should, and they can even be of a large number. On the other hand as Professor Hayson has just said, if the task of the so-called regional representatives or the link between the regions and what they their representatives are supposed to be doing at the national level is clearly spelt out, I don't think numbers are important.

CHAIRPERSON: Professor Steytler.

PROF STEYTLER: Just to comment on the size, I think for any American visitor here they are actually struck about the size of our legislature

and the size of our senate if you compare it with the US which is almost comparable in terms of 435 members in their house of representatives, and there you talk about 300 million people, and the senate there 100, here we talk about 80. It's simply extremely costly for a country of our size to carry so much public representatives. So the amount of saving you can do, I think this is a, in Professor Hayson's model I think you don't pay senators at all because they are already paid by the provinces so that may in fact be a cost saving device. It's an extremely costly exercise to have large numbers of representatives, and I think if one learns from elsewhere, smaller numbers are in fact, they can do the job equally well.

CHAIRPERSON: Senator Groenewald.

SEN GR'WALD: Mr Chairman thank you very much. Just a short comment on numbers. I think when you determine numbers I agree with Professor Haysom. Let's not do it arbitrarily. A lot depends on the functions which the Senate has. For example in the present circumstances my party, one of the smaller parties, to try and have five senators participate in all the portfolio committees and the Constitutional Assembly and all the activities is just impossible.

Normally you have a criteria where you have a few senators and then each senator has three or four staff paid by the taxpayer to assist him in doing his job, or you have a larger number of senators and not so many staff. So the cost is not the real criteria as to the number. The fact is that the smaller your senate is the more aids you will have to give the senator to do a proper job, and specifically if the spread of functions are as large as we and the senate has at this stage.

Going back to the other problem Mr Chairman, we all, I think it's generally accepted that once you have majority rule, you don't really need a constitution to protect the majority, the majority has an in-built protection, the number of votes they have. But you certainly need a constitution to protect minorities, and without going into detail about the definition about minorities the question which we should ask ourselves at this stage, and which we really haven't looked at, is what system is best suited to look after the interests of minorities, and bicameral or a unicameral system? I would like to ask the

panel that specific question.

But before they answer it, just the question about minorities and this goes back to the question about the traditional leaders and other interest groups, even corporate institutions, I agree with Professor Haysom that certainly the question of if you start representing these groups within the senate for example, where do you start and where do you stop? I agree that this is a basic principle. But when we make a statement and say that if you represent the large number of groups then the interests of the senate is so divergent and so widespread that you can't really fulfil a specific function, but isn't that really a function of a senate or a national assembly. The scope of interests that they have to cope for is the total scope of interests of a whole society, so I don't believe that this is such an important argument. So when we talk about representing minorities specifically, I would like to say to the panellist I am certainly referring to the whole spectrum: the question of traditional leaders; the question of the business community; organised business; corporate interest; agriculture; even the civics; the labour unions; and so on and so forth, these are all minorities in some way or other. Isn't this one of the most important functions of a constitution to see that these interests are also protected and isn't the senate ideally suited for this purpose. Thank you.

CHAIRPERSON: I thank the Senator. Will any one of the panellists, Professor Haysom, I think some of the questions were directed towards what you have said.

PROF HAYSOM: Perhaps I need to state, look I think whether the senate, minority protections will not come as it were through the senate unless minorities are particularly represented in the senate and I don't think there has been an argument along those lines, that the senate should be constructed to protect special interest groups, special ethnic groups or other groups. But it needs to be said that democracy takes many forms and I think that there's a simple view; well ... democracy you just need one vote for one kind of institution, but in fact the very same person may want somebody to represent his political interests, somebody to represent his labour interests, somebody to represent his provincial interests, he may have different feelings according to it.

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The senate, or any other institution that you might vote for, is a different way of allowing people to be represented. People who are in fact in a majority in one context and a minority in another. So when one looks at the senate, you are just talking about enriching that level of representation rather than having one democratic form subject to checks and balances by another unrepresented form. Certainly I, to the extent that one will think of any chamber, any system of even regional governments, one is thinking about enriching representation, not simply as brakes on democracy, in fact on the contrary a richer form of democracy.

CHAIRPERSON: Any of the other panellists would like to add to that or.....

PROF DLOVA: History is important in any institution. For example at Codesa we had representatives from the bantustans, who talks about bantustans anymore now. The more stable the society becomes, the less representation perhaps, I mean this is not an all time formula basically, but what I am saying is that once the interests are too diverse there is no consensus, then you need more people there. We have got for example in our constitution, we have got traditional leaders in our constitution, we have got all these other things, but as we progress we will be cutting a little.

Now on the issue of the senate I just wanted to remind people that the United States senate is operating within the framework of total separation, or near total separation. There is no ministerial responsibility to the House of Commons or to the lower house and so on, so that the inclination towards the national interest is also dictated to some degree by that relationship that exist, which we are not proposing in this country. So much of our history will determine how our institutions finally shape.

CLOSURE

CHAIRPERSON:

I think we have had very important inputs, and if I may be allowed to say so I don't think we have come across any classical model that we can follow. I think that what we have been told here are different experiences and we have also been told that these experiences have come about as a result of interest groups, as a result

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of the peculiarities in those countries.

The theme committee have a task of putting forward all these ideas bearing in mind that we are now working towards establishing a democratic constitution for our country and that the interest of all our people should be foremost in drawing up these.

I just have a few announcements to make, because of the electrical fault I have been told there that not all the recordings have been done. It is now requested that our panellists, if you have your paper, if you could hand them over to the secretariat, they would be extremely useful in the compilation of the report. We were supposed to finish at 13:00, and I am sure the Speaker won't mind and won't object if we finish now.

The theme committee meeting for tonight has been postponed for next week Monday.